

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of an Investigation Regarding
Qwest's Compliance with Section 271 of the
Telecommunications Act of 1996 with
Respect to the Provisions of InterLATA
Services Originating in Minnesota

PUC Docket No. P-421/CI-96-1114
OAH Docket No. 12-2500-14473-2

In the Matter of a Commission Investigation
into Qwest's Compliance with Section
271(c)(2)(B) of the Telecommunications Act
of 1996; Checklist items 1, 2, 4, 5, 6, 11, 13,
and 14

PUC Docket No. P-421/CI-01-1371
OAH Docket No. 7-2500-14486-2

ORDER ON MOTION TO STRIKE

On December 6, 2002, Qwest filed a combined motion to strike or respond to certain issues, and to correct citations in its closing brief. Administrative Law Judge Richard C. Luis informed the parties that they had until December 13, 2002, to file responses to the motion. Subsequently, Qwest filed a letter requesting incorporation of the upcoming FCC decision on the applications for 271 approval that Qwest has made in nine states.^[1] Qwest proposed a modification to the schedule in the OSS Checklist docket (Docket 1371) that included modifying Qwest's filing date for a 271 application for Minnesota to February 18, 2003. Judge Luis informed the parties that comments regarding the proposed incorporation and modification to the schedule could be filed until December 13, 2002.

Filings on these issues were received from:

Robert E. Cattnach, Shannon M. Heim, Jason D. Topp, and Charles W. Steese for Qwest.

Steven H. Weigler and Mark Witcher for AT&T.

Ginny Zeller, Assistant Attorney General, for the Department of Commerce.

Harry L. Pliskin, Senior Counsel for Covad.

Gregory R. Merz and Lesley J. Lehr for MCI-Worldcom.

MOTION TO STRIKE

1. Qwest moved to strike portions of briefs by AT&T, the CLEC Coalition, Covad, and MCI-Worldcom. Each issue area will be dealt with individually.

EMERGING SERVICES

2. AT&T and MCI-Worldcom discussed the extent to which emerging services are defined in the SGAT. Qwest asserts that AT&T improperly refers to factual items not in the record (including information posted on Qwest's website and made available to the FCC as part of the Qwest Nine-State Application) and therefore all references to these items and the argument that relies upon those items should be stricken.

3. AT&T maintains that judicial notice should be taken of the disputed information and that this evidence demonstrates that Qwest is misleading CLECs regarding access to emerging services (specifically dark fiber). Judicial notice is appropriate where the factual matter is not subject to dispute. The evidence identified by AT&T is not adequately noncontroversial to be included in the record on that basis. Qwest's motion to strike references to items not in the record is GRANTED. This issue is one of those that can be brought to the attention of the Public Utilities Commission when the ALJ Recommendation is being considered.

4. Qwest maintains that MCI-Worldcom had not identified emerging services in the issues log and therefore Qwest had not addressed this issue specifically. MCI-Worldcom responded that the "Issues Log was, thus, generated as a tool for the parties and the Administrative Law Judge to help organize their analysis." Neither the parties nor the Administrative Law Judge considered the issues log to be the conclusive document as to whether a matter is an issue in this proceeding. The ALJ notes that the issues relating to emerging services have been generally briefed and no further discussion is needed to resolve the issue.

5. AT&T identified an SGAT provision, § 9.5.2.5, as ultimately included in the Washington proceeding, as its position on removing Qwest facilities from the network interface device (NID) and allowing those facilities to dangle. Qwest disputed AT&T's characterization of this language as having been "agreed to" by Qwest. The ALJ understands AT&T to mean that the issue would be resolved by adoption of the ultimately decided SGAT language in § 9.5.2.5.^[2] No further action is needed to resolve this issue.

6. Qwest seeks that a portion of MCI-Worldcom's brief on remote terminals be stricken as based on "cost studies [that] are outside the record in this matter as they were never proffered as exhibits and introduced into evidence."^[3] In its brief, MCI-Worldcom merely cites a Washington Order in a cost proceeding by docket number to support the assertion that Qwest has taken a particular position. Since the argument cites a publicly available decision of the Washington Utilities and Transportation Commission, striking the argument is not appropriate. Since the citation lacks a specific

reference to the portion of the Order supporting the proposition, however, this citation carries little weight. Nothing further is needed to resolve this issue.

LOOP CONDITIONING

7. Qwest styles its motion as seeking to strike the issue of loop conditioning as set out in MCI-Worldcom's brief. But Qwest's own description of the issue is more accurately characterized as a reply brief on the issue of Qwest's process when loop ordering is performed by a CLEC. MCI-Worldcom indicates that it has no objection to Qwest's submittal as tantamount to a reply brief on the issue. Qwest's motion to strike is DENIED. Qwest's alternative motion to supplement the record on this issue is granted, and the Qwest discussion on this issue is hereby admitted to the record.^[4]

LOOP QUALIFICATION

8. Qwest disputes two aspects of Covad's brief regarding loop qualification. The first dispute is over the characterization of witness testimony. There is no question that the matters discussed by the witnesses remained at issue. Qwest's motion to strike this issue is without basis and is DENIED. The second dispute is over the provision of loop qualification information. This issue has remained unresolved in this and other proceedings. No portion of Covad's brief was identified as appropriate to strike. Qwest does identify material that has not been submitted to this record (but has been submitted on an *ex parte* basis to the FCC) as appropriate for the ALJ to consider on the question of loop qualification information. Qwest has not explained why this nonrecord information should be considered. Similar nonrecord information identified by AT&T (and stricken in paragraph 3, above) is prejudicial. The same reasoning applies in this instance. The motion to strike this issue is DENIED. Qwest may bring this information to the Commission's attention at the appropriate time.

LIBERTY RECONCILIATION

9. Qwest seeks to address portions of briefs by Covad and AT&T regarding the reconciliation (Liberty Reconciliation) conducted by Liberty Consulting to resolve disparities between the OSS test results and CLEC data. Qwest maintains that the Finnegan prefiled testimony did not discuss material in one of the documents accepted to the record as an exhibit. Therefore, by Qwest's reasoning, there was no notice of the issue and Qwest should be allowed to supplement the record with seven pages of reply brief.

10. The Department of Commerce strenuously objected to supplementing the record in this fashion. As the Department pointed out:

From the outset of the 271 proceeding, the Commission, the Office of Administrative Hearings, and the non-Qwest parties have been driven at a relentless pace by Qwest's stated intent to file its application with the FCC with or without completion of the Minnesota proceeding. Qwest delayed its original projected March 31, 2002 FCC filing date by increments throughout the year, requiring the Court and parties to scramble repeatedly to accommodate Qwest's latest vision of its filing trajectory. In the current

docket, the ALJ established a single round of post-hearing briefs, eliminated exceptions, and shortened the time for the ALJ report so that the Commission could receive the ALJ's findings prior to Qwest's then-declared FCC filing date of December 31, 2002

11. Commerce's objection is sound. The absence of replies to the myriad issues in this proceeding is by design and largely compelled by Qwest's schedule. The information cited by AT&T is in the record and the overall issue of the adequacy of the Liberty Reconciliation was understood to be disputed by all the parties. Qwest's objection to Covad's brief is substantially similar to what Qwest complained about with respect to AT&T's brief. There is no basis for allowing a Qwest-only reply on this issue. Qwest's motion to supplement the record on the Liberty Reconciliation issues is DENIED.

UNE COMBINATION PRIVATE LINE SERVICE

12. Qwest objects to the CLEC Coalition's characterization of UNE combination private line service as an issue. The CLEC Coalition maintains that Qwest only allows this service where there is already an existing resold service in place. Qwest has moved to strike this portion of the CLEC Coalition's brief. Qwest maintains that the CLEC Coalition has confused SGAT § 9.23.3.7.2.11 (defining EEL-C which is a conversion of a resold line) with SGAT § 9.23.3.7.2.12 (defining EEL-P which is new installation). The CLEC Coalition made no response to Qwest's motion. The arguments by Qwest are in the nature of a reply and, therefore, Qwest's motion to strike is inappropriate. Its motion to strike is DENIED. No further information is needed to resolve the issue.

DEDICATED TRANSPORT

13. Qwest objects to the discussion of unbundled dedicated interoffice transport (UDIT) and extended unbundled dedicated interoffice transport (EUDIT) issues in MCI-Worldcom's brief. Qwest cites the issues log and notes that this issue was identified as "resolved" referencing the outcome in the cost docket (Docket 1375).^[5] MCI-Worldcom did not respond to Qwest's notation that the issue was resolved. The other references to the issues log, discussed above, have all been assessing the impact of omission of an issue. By contrast, the UDIT-EUDIT issue was expressly identified as resolved. Qwest was entitled to rely on that affirmative agreement that no issue remained for briefing in this area. Qwest's motion to strike the discussion in MCI-Worldcom's brief on UDIT and EUDIT is GRANTED.

MOTION TO CORRECT TRANSCRIPT CITATIONS

14. Qwest moved to correct transcript citations in its brief since the cited pages referred to an earlier version of the transcript. A matrix of corrected citations was provided. Qwest's motion to correct the transcript citations is GRANTED.

MOTION TO INCORPORATE FCC DECISION

15. Qwest has sought a change to the schedule in this docket to delay the issuance of the ALJ Recommendation and the Commission's consideration (and

correspondingly delay the schedule for Qwest's filing with the FCC). Qwest's reason for requesting the delay is to allow the incorporation of the FCC decision in Qwest's Nine-State Application into the record in this matter.^[6] Implicit in the new schedule proposed by Qwest is the expectation that this FCC decision will be issued soon.

16. The Department expressed concern that Qwest would want to use the FCC decision in the Nine-State Application as evidence in this proceeding. MCI-Worldcom echoes the evidentiary concerns of the Department and indicated that, consistent with the Tenth Prehearing Order in these dockets, the parties should have a chance to respond after the FCC decision is filed.

17. The approach to incorporation of materials from other 271-related proceedings was set out in the Tenth Prehearing Order governing these proceedings.^[7] As that Order states:

Any material, including testimony, exhibits, reports, recommendations, and decisions, available in document form in any of the Related 271 Proceedings may be incorporated into the record of any Minnesota docket if it is relevant, reliable, and not unduly repetitious under the Rules of Evidence of the Office of Administrative Hearings, Minn. R. 1400.7300, does not create unfair surprise or burden, and is submitted in accordance with the following paragraphs.

18. The procedure described in the Tenth Prehearing Order provided an opportunity to object or comment on the material to be incorporated. The reason for this procedure was to ensure the reliability of the information in these dockets. In this instance, there is no such concern. Since the FCC decision will be made on the evidentiary records from other states, there is no reason to rely upon the FCC decision for evidentiary conclusions in this docket. But the FCC decision will clarify what issues the FCC wants the state commissions to address in the application process. This is the first FCC decision regarding a Qwest 271 application. Incorporating that decision will provide material assistance to the PUC in making its recommendation to the FCC when Qwest files its Minnesota 271 application.

19. The parties' concerns about the need to respond to the FCC decision are valid. The FCC decision will be based on the records in the nine states' proceedings, not the Minnesota record. The schedule adopted must allow the parties an opportunity to present arguments as to how the record in this docket relates to the FCC's analysis of the issues. Therefore the Administrative Law Judge issues the following:

SCHEDULE

December 23, 2002

Qwest files FCC Decision with OAH

January 3, 2003

Comments on FCC Decision Due
(All Parties)

January 24, 2003

ALJ Recommendation Due

February 18, 2003

Earliest Qwest filing date with the FCC for
Section 271 Approval

Dated: December 18, 2002

_____/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

[1] ITMO the Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming (FCC WC Docket No. 02-314) ("Qwest Nine-State Application").

[2] As described in the Washington Utilities and Transportation Commission's 31st Supplemental Order; Order Granting Qwest's Petition for Reconsideration of the 24th Supplemental Order and Granting and Denying Petitions for Reconsideration of the 28th Supplemental Order, paras. 30-33 (April 12, 2002).

[3] Qwest Combined Motion to Strike, at 7.

[4] Located in the Qwest Combined Motion to Strike, at 7.

[5] Qwest Combined Motion to Strike, at 8.

[6] ITMO Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services, *supra*, (FCC WC Docket No. 02-314).

[7] In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provisions of InterLATA Services Originating in Minnesota, PUC Docket No. P-421/CI-96-1114, OAH Docket No. 12-2500-14473-2, Tenth Prehearing Order (issued January 10, 2002).